IN THE

Supreme Court of the United States

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
municipal corporations,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 14, 1977

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Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the order and judgment and the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on August 16, 1977.

Opinions and Orders Below

The order and judgment and the opinion of the Court of Appeals, not yet officially reported, are reproduced in the Appendix[1] at 6a and 7a, respectively; its opinion appears at 1977-2 CCH Trade Cas. ¶61,587. The May 1, 1975 order and opinion of the district court, not officially reported, are reproduced at 31a; its opinion appears at 1975-1 CCH Trade Cas. ¶60,318 and at 18 P.U.R. 4th 175. The October 22, 1976 order of the district court, not otherwise reported, is reproduced at 54a.

Jurisdiction

The order and judgment and the opinion (6a and 7a, respectively) of the Court of Appeals were entered on August 16, 1977. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

Whether the United States Court of Appeals for the Seventh Circuit erred in deciding that this Court's decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976), holding as it does:

1. that the Federal Power Commission has jurisdiction to consider allegations of an anticompetitive "price squeeze"; and

2. that the Federal Power Commission must consider allegations of an anticompetitive "price squeeze" in setting wholesale electric rates;

1. Citations with the suffix "a" are to the Appendix hereto.

does not vest in the Federal Power Commission[2] exclusive or, alternatively, primary jurisdiction to hear and rule upon plaintiffs' "price squeeze" allegations.

Statutes Involved

This petition involves issues which require an accommodation between Sections 205 and 206(a) of the Federal Power Act, on the one hand, and Section 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act, on the other hand. These statutes are set out in the Appendix hereto at 1a through 5a.

Statement of the Case

The jurisdiction of the district court was invoked by a Complaint which purports to raise alleged violations of the Sherman Act, §2, 15 U.S.C. §2, and of the Clayton Act, §§4 and 16, 15 U.S.C., §§15 and 26 (1970). At issue on this petition is whether or not there is an implied repeal of antitrust jurisdiction in a district court, such repeal being predicated upon the determination by this Court that a regulatory agency must accept and exercise jurisdiction over the identical allegations of specific antitrust violations

2. On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. We have, for purposes of convenience, used the designation "FPC" herein wherever it is intended to refer to either the Federal Power Commission or the Federal Energy Regulatory Commission.

in a regulated industry which are presented for determination by the Complaint filed in a district court.

Indiana & Michigan Electric Company ("I&M") is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at retail and at wholesale for resale. This antitrust action was commenced on March 25, 1974 in the United States District Court for the Northern District of Indiana, South Bend Division, against I&M by ten of its municipal wholesale-for-resale customers, which are located in the States of Indiana and Michigan ("Municipalities").[3]

Municipalities instituted this action during the pendency of lengthy proceedings before FPC, and the Complaint and the Amendment to the Complaint allege matters which were and which, in part, are still the subject of proceedings before FPC. In addition, the Complaint alleges matters which were, and are, subject to the jurisdiction of the Public Service Commissions of Indiana and Michigan ("Indiana Commission" and "Michigan Commission," respectively).

A. The Complaint

The Complaint seeks declaratory and injunctive relief and treble damages for alleged violations of Section 2 of the Sherman Act. 61a. The Complaint alleges that I&M monopolized and attempted to monopolize interstate trade and commerce in the retail distribution and sale of electric power. Specifically, it is charged that I&M sought to eliminate Municipalities as competitors in the sale of electric

3. I&M has other wholesale-for-resale customers—municipalities, rural electric cooperatives and investor-owned utilities—which are not plaintiffs here.

power at retail by creating a difference, i.e., a "price squeeze," between (a) the wholesale price I&M charges Municipalities for the sale of electric power and (b) the retail price I&M charges its direct industrial customers for electric power.[4] 58a-60a.

Municipalities allege that the price squeeze prevents them from competing effectively with I&M for industrial customers. The Complaint charges that the price squeeze is reflected in a rate increase made effective by FPC, subject to refund, on January 13, 1973, which affected the rates charged Municipalities by I&M. 58a-59a. On May 28, 1976, I&M made a further filing with FPC for an increase in its wholesale rates to Municipalities, and an Amendment to the Complaint alleges that a further price squeeze was created when that increase became effective, subject to refund, on July 27, 1976. 63a-64a.[5]

B. I&M's Motion to Dismiss

On May 1, 1974, I&M moved the district court to dismiss or, in the alternative, to stay the instant proceedings. On May 1, 1975, the district court, per District Judge Grant, issued an Order and Memorandum denying I&M's motion. 31a.

4. I&M has approximately 31 retail Tariffs on file with the Indiana Commission, five of which I&M would concede are industrial Tariffs; I&M likewise has approximately 14 retail Tariffs on file with the Michigan Commission, two of which I&M would concede are industrial Tariffs. The complaint does not specify which of I&M's retail Tariffs create the alleged price squeeze.

5. I&M's answer to the Complaint was served on June 27, 1975 and I&M's answer to the amendment of the Complaint was served on November 5, 1976.

On May 12, 1975, I&M filed a motion to reconsider, vacate, set aside and amend the district court's May 1, 1975 Order, and to certify for appellate review, pursuant to 28 U.S.C. §1292(b), the questions of law which are raised in this Petition. On October 22, 1976, District Judge Sharp adhered to District Judge Grant's May 1, 1975 Order and Memorandum, but certified the issue to the United States Court of Appeals of the Seventh Circuit. 54a. The Court of Appeals thereafter accepted the certification.

C. *FPC* v. *Conway Corp.*

In the early stages of the proceedings before FPC involving I&M's June 13, 1972 filing for upward revisions in its wholesale rates (FPC Docket No. E-7740), FPC ruled, in an Order issued November 27, 1973 and affirmed on rehearing on January 17, 1974, that the claim of Municipalities, among others, of a wholesale-retail price squeeze would not be considered in the pending proceeding.[6] On March 7, 1974, Municipalities, among others, filed a Petition for Review, pursuant to Section 313 of the Federal Power Act with the United States Court of Appeals for the District of Columbia Circuit to review FPC's Orders of November 27, 1973 and January 17, 1974 and three weeks later, on March 28, 1974 the Complaint herein was filed with the district court.

On June 7, 1976, this Court issued its decision in *Federal Power Commission* v. *Conway Corp.,* 426 U.S. 271

6. On January 31, 1974, the Presiding Administrative Law Judge assigned to FPC Docket No. E-7740 granted an FPC Staff Counsel's motion to eliminate all price squeeze testimony and exhibits from FPC Docket No. E-7740.

(1976), holding that FPC has jurisdiction, which it must exercise, to consider allegations of an anticompetitive price squeeze in setting wholesale electric rates. All parties recognize the impact of *Conway* on the issues in this action.[7] Following this Court's decision in *Conway,* Municipalities and the other members of the Indiana and Michigan Municipal Distributors Association ("IMMDA")[8] requested FPC to "confess error" before the District of Columbia Court of Appeals for FPC's prior refusal to consider IMMDA's price squeeze allegations in connection with IMMDA's challenge to I&M's 1972 rate increase filing. In August, 1976, a successor FPC Presiding Administrative Law Judge ruled on the issues involving I&M's 1972 rate increase filing, and, among other things, he recommended that the price squeeze issues raised by Municipalities through IMMDA be resolved by FPC in further proceedings.[9]

7. I&M's motion for reconsideration of District Judge Grant's Order and Memorandum of May 1, 1975 was predicated upon the Court of Appeals decision in *Conway,* 510 F.2d 1264 (D.C. Cir. 1975), subsequently affirmed by this Court.

8. IMMDA is an *ad hoc* association of twelve of I&M's municipal wholesale-for-resale customers, ten of which are the plaintiffs here.

9. Initial Decision, issued August 19, 1976 in FPC Docket No. E-7740. Issues raised in Docket No. E-7740 were the subject of an Agreement of Settlement and Compromise entered into between IMMDA and I&M, and that Agreement was approved by FPC in its Order issued June 1, 1977. Municipalities contended before the Court of Appeals that that Agreement did not bear upon their ability to prosecute antitrust claims arising out of I&M's 1972 rate filing, and the Court of Appeals has directed the district court to determine whether that Agreement has mooted any of the antitrust claims in this case. As the Court of Appeals has noted, however, the claims premised upon I&M's July 27, 1976 wholesale rate filing with the FPC are still "active." 30a.

D. Court of Appeals Decision

In its opinion dated August 16, 1977, the Court of Appeals affirmed both the May 1, 1975 and October 22, 1976 orders of the district court and held that FPC's jurisdiction, under *Conway,* to hear and determine price squeeze allegations is neither exclusive nor primary, and that the district court may proceed to determine the antitrust allegations raised in this action.

The Court of Appeals ruled that FPC's price squeeze jurisdiction is not exclusive because its remedial powers are not coextensive with those of the district court. Relying upon this Court's observation in *Conway,* that FPC's power to remedy an anticompetitive price squeeze is limited to a wholesale rate adjustment "at the very least" to the lower range of the zone of reasonableness for the recovery of fully allocated costs (426 U.S. at 279), the Court of Appeals found that the powers of the district court, including the power to grant treble damages and injunctive relief, are required to supplement those of FPC. 14a-16a, 20a, 26a. Thus, the decision below turned on an erroneous assumption that exclusive jurisdiction in a regulatory agency can only be found when it has remedial powers that are coextensive with the remedial powers of a district court.

Moreover, the Court of Appeals erroneously analyzed this Court's decision in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), which held that that utility's light bulb exchange program was not exempted from the federal antitrust laws by virtue of that program's inclusion in a rate tariff filed with, and approved by, a State public service

commission. Applying the language of *Cantor* to the instant case, the Court of Appeals ruled that "[t]he state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant" (17a), and that the state action[10] exception to the federal antitrust laws was therefore inapplicable.

The decision below declared that FPC's regulatory process would not be disturbed by an award of damages for past anticompetitive conduct or by a district court injunction regulating I&M's conduct "in making and promoting its rate applications" prior to their submission to various regulatory agencies. Any conflict between determinations in the district court and FPC would be avoided, the Court of Appeals held, because "the district court would presumably order [I&M] to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers." 26a. The Court below therefore held that FPC's jurisdiction to hear and determine price squeeze claims is not exclusive and, therefore does not oust the district court of its jurisdiction, under the federal antitrust laws, to determine the same claims.

Further, the Court of Appeals rejected I&M's arguments that FPC's jurisdiction to hear and determine price squeeze claims is at least primary and that the district court proceedings should be stayed pending a determination by FPC.

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10. *Parker* v. *Brown,* 317 U.S. 341 (1943).

Reasons for Granting the Writ

The argument that follows demonstrates that the Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the district courts, as to call for an exercise of this Court's power of supervision. The decision of the Court of Appeals will disrupt the orderly regulatory process because (1) the decision below will encourage the growing practice of filing dual price squeeze claims with FPC and with the district courts; (2) the ruling of the court below directly conflicts with the principles of antitrust repealer set forth in decisions of this Court; (3) the decision below relies upon an overexpansive reading of this Court's ruling in *Cantor;* and (4) judicial economy requires that FPC exercise primary jurisdiction, at least, over price squeeze claims.

POINT I

The decision below disregards the natural implications of *Conway* and will encourage the growing practice of filing dual claims of price squeeze with both FPC and the district court.

This Court's decision in *Conway* directs FPC to resolve claims of an anticompetitive price squeeze arising from differing wholesale and retail rates, and to alleviate any anticompetitive price squeeze found to exist to the extent of its jurisdiction. Numerous price squeeze claims of the kind at issue herein have been filed with FPC. *E.g., Boston Edison Co.,* FPC Op. No. 809, Docket Nos. E-7738 and

E-7784, 12 F.P.S. 5-577 (July 6, 1977); *Connecticut Power & Light Co.,* FPC Op. No. 761-A, Docket No. E-7743, 12 F.P.S. 5-746 (July 20, 1977); *Dayton Power & Light Co.,* FPC Order, Docket No. ER76-887 (October 13, 1977); *Minnesota Power & Light Co.,* FPC Ruling, Docket No. ER77-427 (Sept. 26, 1977); *Central Power & Light Co.,* FPC Order, Docket No. ER77-514 (October 14, 1977); *Gulf Power Co.,* FPC Docket No. ER77-532; *Louisiana Power & Light Co.,* FPC Order, Aug. 26, 1977, Docket No. ER77-533, 42 Fed. Reg. 44583-585 (Sept. 6, 1977); *Columbus & Southern Ohio Electric Co.,* FPC Order, Aug. 26, 1977, Docket No. ER77-529, 42 Fed. Reg. 44026-027 (Sept. 1, 1977); *Union Electric Co.,* FPC Order, October 25, 1977, Docket No. ER77-614, 42 Fed. Reg. 57515-516 (Nov. 3, 1977). *See also Philadelphia Electric Co.,* FPC Order No. 791, Docket Nos. E-7795 and E-7989, 11 F.P.S. 5-906 (April 6, 1977) (reverse price squeeze asserted by utility). Similarly, numerous price squeeze claims of the kind at issue herein have been filed in the district courts across the country. *E.g., Cities of Batavia* v. *Commonwealth Edison Co.,* Civil No. 76 C 4388 (N.D. Ill.); *City of Newark* v. *DelMar-Va Power & Light Co.,* Civil No. 77-234 (D. Del.); *City of Shakopee* v. *Northern States Power Co.,* Civil No. 4-75-591 (D. Minn.); *City of Kirkwood* v. *Union Electric Co.,* Civil No. 77-0947-C(2) (E.D. Mo.); *Town of Norwood* v. *Boston Edison Co.,* Civil No. 74-4104T (D. Mass.); *City of Groton* v. *Connecticut Light & Power Co.,* Civil No. 15609 (D. Conn.); *Towns of Concord* v. *Boston Edison Co.,* Civil No. 76-4556 (D. Mass.); *Richmond Power & Light* v. *Indiana & Michigan Electric Co.,* Civil No. S 77-173 (N.D. Ind.); *Cities and Villages of Plymouth* v. *Wisconsin Power & Light Co.,* Civil No. 77C223 (W.D. Wis.); *Borough of El-*

wood v. *Pennsylvania Power & Light Co.*, Civil No. 77-1145 (W.D. Pa.).[11]

The Court of Appeals' decision encourages the practice of dual proceedings, administrative and judicial, and requires the federal courts to hear and determine the same issues that are being heard and determined by FPC. While a district court's determination in a price squeeze case might appear to have the virtue of operating upon wholesale *and* retail rates, it has the concomitant and fatal disadvantage of interfering with all levels of the rate-making process previously entrusted to FPC and to the State commissions. A second regulatory system for wholesale and retail rate-making is thus being created in the federal courts, whose background in the field does not commend them to be preferred over the natural and specially chosen regulatory agencies, federal and State.

I&M does not believe that this Court entertained and decided the *Conway* case, mandating FPC to exercise its jurisdiction to resolve antitrust price squeeze allegations in the electric utility industry, in the expectation that the district courts would conduct parallel proceedings on precisely the same issue. The orderly distribution of jurisdiction, related both to convenience and natural competency, contemplated by *Conway,* is disrupted by the invitation to multiple proceedings which is inherent in the decision below. The logical corollary to this Court's holding in *Conway* is that the district court is not expected to exercise jurisdiction over the identical subject matter, since existence of district court jurisdiction over these issues would have obviated any necessity for this Court to re-

11. Clearly, the liminal jurisdiction issues raised by this petition, and directly involved in each of the cited cases, can and should be resolved at the outset of the litigation. *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 686 (1975).

quire FPC, with its jurisdictionally limited ability to provide a remedy, to hear them as well.

The Court of Appeals indicates that the district court is a necessary forum for allegations of anticompetitive price squeezes because, under *Conway,* FPC's ability to remedy the squeeze is limited, "at the very least," to the setting of the wholesale rate in the lower range of the zone of reasonableness. 14a-16a. That power may indeed be quite sufficient. *See Carolina Power & Light Co.,* FPC Docket No. ER76-495 (Phase II), Initial Decision of the Administrative Law Judge at 82 (Sept. 7, 1977). The right course would seem to be to allow FPC to exercise its jurisdiction as this Court has required, without proceeding on the assumption that it will administer relief improperly and require a district court to be constantly looking over its shoulder. Should FPC fail in its duty, there is an obvious remedy without need for a perennial monitor, for a rate set *below* the zone of reasonableness would be confiscatory and therefore unconstitutional. *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 585 (1942); *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923); *Public Service Commission* v. *F.P.C.,* 487 F.2d 1043, 1092 (D.C. Cir. 1973).

The Court of Appeals' rationale for rejecting the principle of exclusive jurisdiction in FPC is that its remedial power is limited by *Conway* to its jurisdictional power to set rates within the zone of reasonableness. However, a wholesale rate level set below the zone of reasonableness would be confiscatory and therefore unconstitutional

whether imposed by FPC or by the district court. Thus any district court injunction affecting I&M's rate submissions to FPC and to the State Commissions would have to consider the justness and reasonableness of the rate, including the rate of return, a concept reflecting the public interest in the financial soundness of essential private utilities, as well as all of the other public interest considerations that animate the administration of the Federal Power Act and the several State public utility regulatory statutes. Under the procedure envisioned by the Court of Appeals below, the district courts would be conducting parallel and duplicative reviews of I&M's submissions to FPC and to the Indiana and Michigan Commissions, and the district courts would have the power and obligation to make parallel determinations in matters of regulatory mechanics that have been delegated to administrative agencies.

In *Commonwealth of Pennsylvania* v. *State of West Virginia,* 262 U.S. 553 (1923), Justice Brandeis, in dissent, viewed as unacceptable the assumption by this Court, and impliedly by the federal court system, of suits requiring the exercise of regulatory judgments in an area of commerce over which the Commission would later exercise jurisdiction:

> "Clearly, this Court could not undertake such determinations. To make equitable distribution [of gas] would be a task of such complexity and difficulty that even an interstate public service commission with broad powers, perfected administrative machinery, ample resources, practical experience and no other duties, might fail to perform it satisfactorily. As this Court would be powerless to frame a decree and provide machinery

> by means of which such equitable distribution of the available supply could be effected, it should, according to settled practice, refuse to entertain the suits. Compare *Marble Co.* v. *Ripley,* 10 Wall. 339, 358; *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U.S. 393, 406; *Giles* v. *Harris,* 189 U.S. 475, 487, 488." 262 U.S. at 623.

The duplication of judicial administrative effort would, of course, have its counterpart in parallel and duplicative review mechanisms. If FPC concludes that I&M's wholesale rate is "just and reasonable" and that it does not create an anticompetitive price squeeze, the appropriate judicial forum for reconsideration of FPC's determination, as provided by statute, would be the court of appeals empowered to review FPC's decisions under Section 313 of the Federal Power Act, 16 U.S.C. §825*l* (1971). If the district court is not required to dismiss this action, as I&M contends it is, or does not choose to stay this action for any reason, the appellate procedure available in antitrust cases would result in the delivery of a second complete record, incorporating perhaps inconsistent findings of fact, to a second court of appeals. One court of appeals might sit in review of the district court's action while another sits in review of FPC proceedings; alternatively, a single court of appeals might sit in review of two determinations on the same issue, based upon two separate records, and would be governed by disparate standards of review. In neither event would judicial economy be served; inevitably there would be duplication of effort on the part of courts, litigants and witnesses. The danger of conflicting results is patent.

POINT II

The decision below conflicts with the principles of implied repeal of the antitrust laws set forth in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

The Court of Appeals' decision virtually assures that complex issues of ratemaking will be made subject to conflicting and duplicative fact-finding and review and creates a grave potential for irreconcilable collision between regulatory and judicial resolutions of price squeeze allegations involving the electric utility industry.[12] A line of decisions issued by this Court, and not followed by the Court of Appeals, avoids just such conflict and duplication. This Court should grant review to consider that, if as we believe, this line of decisions is clearly applicable, the Court of Appeals erred in not applying it.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), this Court upheld application of the antitrust laws to the Exchange's act of severing plaintiff's private telephone wire connections with the Exchange's member firms, on the ground that the Exchange's rule authorizing such an act, while sanctioned by the Securities and Exchange Commission ("SEC"), was nevertheless not subject to SEC jurisdiction with respect to the particular applications of the Exchange's rule. 373 U.S. at 357. The Court found no implied repeal of the federal antitrust laws in *Silver* because the facts presented and the claims asserted did not

12. A Petition for a Writ of Certiorari was filed on September 8, 1977, in *American Telephone & Telegraph Co.* v. *United States*, Docket No. 77-372, which raises similar issues arising under different procedural circumstances.

involve "any problem of conflict or coextensiveness of coverage with the agency's regulatory power." 373 U.S. at 358. The Court noted, however, that a "different case" would have arisen if there had been SEC "jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling." 373 U.S. at 358 n.12.

The instant action presents such a "different case" because I&M's rates are subject to searching review before FPC and the State regulatory agencies. In that sense, it presents the identical legal issue decided by this Court in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975). There, the very conflict held absent in *Silver* was found to exist, because of the SEC's power over fixed rates on brokerage commissions and the district court's jurisdiction over the antitrust implications of those rates. In *Gordon*, this Court found it critical that the SEC's power was not limited to approval or disapproval of the Exchange's commission rates and that the SEC "was permitted to require alteration or supplementation of the rules and practices" where necessary. 422 U.S. at 685. Distinguishing *Silver*, this Court noted that "there was no governmental oversight of the exchange's self-regulatory action" in that case, "and no method of insuring that some attention at least was given to the public interest in competition." 422 U.S. at 684. The principles enunciated in *Gordon*, where the antitrust laws were held inapplicable to the rate because it was subject to change by the regulatory authority (that is, because the SEC had a species of rate-making authority), are applicable to the instant case. Here, pervasive rate-making authority is vested in FPC and in the State regulatory agencies, and FPC is mandated, under *Conway*, to consider the public interest in competition in setting the wholesale rates paid by the Municipalities.

On the same day this Court decided *Gordon,* it also ruled, in *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975), that the SEC's regulatory authority "displaces" the federal antitrust laws with respect to fixed resale prices of mutual fund shares in secondary market transactions. Even though the SEC had never formulated any rule or regulation governing such transactions, an implied repeal of the antitrust laws was nevertheless held to exist by reason of the statutory authority for mutual funds to impose the challenged restrictions, provided, *inter alia,* that they did not conflict with any SEC rule or regulation. This Court deduced the intention of Congress to effect an implied repeal of the antitrust laws from the "substantial danger that appellees would [otherwise] be subjected to duplicative and inconsistent standards." 426 U.S. at 735. Thus the power of the regulatory body to make rules and regulations, even where that power had not been exercised, was sufficient to create that "plain repugnancy" between the regulatory scheme and the application of the antitrust laws required to effect an implied antitrust immunity, as earlier held in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351 (1963).

The Court of Appeals decision herein purports to avoid the problem of conflict between regulatory and judicial powers by noting that the district court could remedy an alleged price squeeze by an injunction bearing upon the formulation by I&M of its rate filings *prior* to their submission to FPC and to the State commissions. The district court thus is encouraged to influence the outcome of the various rate-making procedures by bringing its power to

bear upon the filings themselves prior to any regulatory consideration of them. This formulation effectively stands orderly administrative procedure for rate-making on its head.

This Court stated in *Conway* that FPC has remedial power "at the very least" to reduce I&M's wholesale rates to the lower reaches of the "zone of reasonableness." 426 U.S. at 279. The Court of Appeals decision below rests heavily upon FPC's inability *fully* to alleviate a price squeeze between the wholesale and retail price structures, irrespective of the zone of reasonableness for wholesale rates. I&M submits that the limitation on FPC's remedial power embodied in *Conway* springs from the lively awareness that an anticompetitive price squeeze is only one of the myriad considerations to be taken into account by FPC in a wholesale rate case and that its determination must serve a complex set of competing public interests. These competing interests cannot be sidestepped or ignored by the Court of Appeals' expedient of endowing the district court with its own supervisory powers over rate-making.

In *Conway,* this Court refrained from directing FPC to sacrifice any and all other considerations to the alleviation of an anticompetitive price squeeze. However, if electric utilities are to be made subject to district court mandates with respect to the formulation of their rate filings, the federal courts will have rendered antitrust considerations paramount to all other public interests served by rate-making procedures. The Court of Appeals' decision below effectively restricts FPC's necessary flexibility in rate-making by asserting district court jurisdiction over rate filings prior to their submission to the appropriate regulatory agency.

The Court of Appeals recognized that any clear repugnancy between the regulatory and judicial powers would effect a repealer of the antitrust laws. Its decision therefore emphasized its view that there would be no conflict between a district court injunction affecting the *formulation* of I&M's submissions, prior to filing, and whatever rate order ultimately issued from FPC. The danger inherent in and created by that analysis, however, is that the district court would render FPC helpless to set a higher rate than the rate required to be submitted to FPC under the district court mandate, even where a higher rate would be necessary not only to provide a rate of return sufficient to ensure the financial soundness and integrity of the public utility, but also to assure that the rates themselves are not confiscatory. Thus, although conflict *in terms* between the regulatory and judicial determinations might appear to be avoided, a clear repugnancy remains. This certainly exalts form over substance.

POINT III

The decision below relies on an over-expansive reading of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), as this Court's opinion in *Bates* v. *State Bar of Arizona*, —— U.S. ——, 97 S.Ct. 2691 (1977) demonstrates.

Orderly rate making procedures for the electric utility industry have been imperiled by the Court of Appeals' over-expansive reading of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). In *Cantor*, this Court declined to apply the *Parker* v. *Brown*[13] exception to the antitrust laws with respect to Detroit Edison's policy of distributing free light

13. 317 U.S. 341 (1943).

bulbs. Despite the approval by the State utility commission of a tariff including such a program, this Court noted that the "option to have . . . such a program" belonged primarily to the utility. 428 U.S. at 594. The Court of Appeals in its decision below has imperiled the rate-making machinery by applying that rationale to I&M's rate applications in their totality; *i.e.*, the Court of Appeals ruled that a utility has the "option" of creating or not creating a price squeeze at the time it formulates its rate filings, and that no State has an "interest" in maintaining a price squeeze.

Cantor held, as this Court has said in *Bates* v. *State Bar of Arizona*, —— U.S. ——, 97 S.Ct. 2691 (1977), that the *Parker* v. *Brown* exception is inapplicable to particular programs or activities in which the "market" affected is one in which the state has no "independent regulatory interest." The *Parker* v. *Brown* exception was thus unavailable in *Cantor* because the "State had no independent regulatory interest in the market for light bulbs." *Bates* at 2697. However, the market affected by the type of order envisioned by the Court of Appeals here is no less than the retail market for the generation and distribution of electric power, in which the states have a powerful regulatory interest and over which they exercise and have legislated pervasive regulation.

The Court of Appeals has misconstrued the *Cantor* test by looking to the "challenged activity" rather than to the market in which that activity takes place. The opinion below suggests that the States have no interest in perpetuating the challenged activity, *i.e.*, the alleged price squeeze (17a), and has thus opened the entire field of rate-

making to district court supervision. The Court of Appeals' analysis improperly sidesteps any evaluation of the States' interests in the market affected, *i.e.*, the sale of electric power, even though that inquiry is critical to any application of the *Cantor* principle.

The indiscriminate breadth of the Court of Appeals' reading of *Cantor* is demonstrated by a comparison of the relative impact of the rulings in *Cantor* and in the instant case upon rate-making regulatory procedure. Under *Cantor,* the district court may direct the utility to remove from its retail electric rate tariff a single discrete item whose market is not subject to any pervasive regulatory scheme and in the market for which the state has no "independent regulatory interest"; in the instant case, the district court is given supervision over wholesale and retail tariffs for electric power, a supervision which embraces the mechanics of formulating the tariffs, the appropriateness of their individual elements, the fairness of the individual tariffs and the interrelationship of different rates set by different regulatory jurisdictions.

The States of Indiana and Michigan have manifested their interest in electric utility rate-making by implementing pervasive administrative procedures for its regulation. The Court of Appeals declared below that the Indiana and Michigan Commissions "have only put the imprimatur of their sanction on the retail rates charged by the defendant" (17a); however, the Indiana and Michigan Commissions function under broad grants of statutory authority: Burns Ind. Stat. Ann., Title 8, §8-1-1-5 (1973); Mich. Stat. Ann., Title 22, §22.13(6) (1970). Although I&M's retail electric rates originated in the form of requests by I&M for rate

charges, they have emerged from the respective State commissions, after notice and adversary proceedings, as products of those commissions.[14] The Complaint herein does not and could scarcely allege otherwise. It has been settled for over half a century that

> "[t]he prescribing of rates is a legislative act. The [Public Service Commission of West Virginia] is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679, 683 (1923).

Similarly, FPC, as an instrumentality of Congress, possesses and exercises vast discretionary power over wholesale tariffs. Federal Power Act, §§205 and 206.

The grant of parallel regulatory power in the district court to govern the relationship between the several retail and wholesale rate structures, to issue findings of fact with respect to each and to regulate by injunction the initial submissions in their totality, raises a likelihood of conflict between regulatory and judicial functions. The unseemliness of a struggle for priority and public acceptance conducted by separate regulatory bodies over the same battleground is evident and could be avoided by a proper reading and appreciation of this Court's decisions. The economic and judicial waste inherent in such duplicative procedures is no less disturbing.

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14. As a matter of public record, I&M's 1976 filing for a retail rate increase of approximately $75 million from the Indiana Commission resulted in an order from that Commission granting an increase of only about $41 million. While the factual allegations contained in the Complaint are deemed to be true in the motion which is the subject of this petition, the Complaint nowhere indicates whether the charge of a predatory retail rate is based upon I&M's submissions to the State commissions, or upon the *orders* of the State commissions.

POINT IV

Judicial economy requires that FPC exercise primary jurisdiction over price squeeze allegations.

The Court of Appeals also declined to rule that FPC has primary jurisdiction over anticompetitive price squeeze allegations, adding that this antitrust action could be held in abeyance at some later time if deference to FPC would avoid a "significant inconsistency" that would be "certain to arise" between the judicial and regulatory proceedings. 23a. I&M submits that the Court of Appeals' denial to FPC of at least primary jurisdiction was error, particularly since the chief justification offered by the Court of Appeals for the conduct of parallel judicial and regulatory proceedings was the superior *remedial* power of the district court.

FPC is uniquely qualified by its expertise to render determinations with respect to the threshold question of whether or not an anticompetitive price squeeze exists. As previously noted, that issue raises singularly complex questions involving numerous technical variables. In *Cities of Batavia* v. *FPC,* 548 F.2d 1056 (D.C. Cir. 1977), decided after *Conway,* the court vacated a pre-*Conway* FPC order[15] declining to exercise jurisdiction over a price squeeze claim virtually identical to that raised in this action. On review, FPC argued that there was a justified differential between the wholesale rate paid by plaintiff municipalities, whose energy demands coincided with the peak load of the system, and the retail rate paid by industrial customers, whose

15. Petitioners in that case appeared before the Seventh Circuit as Amicus Curiae.

energy demands generally did not coincide with the peak load of the system. In the exercise of its review powers over FPC orders, the District of Columbia Circuit remanded, enumerating some of the complex issues to be resolved by FPC:

> "Under the *Conway* doctrine the Commission function extends not only to consideration of the existence of a difference between jurisdictional and non-jurisdictional rates, but also to the anticompetitive impact of the particular magnitude of rate differential. The Commission's counsel indicates that the amount of the differential set by the Commission is more than justified by the cost differences of the two services. This contention, however, requires a knowledge of the nature of the system's costs, both fixed and variable, as well as the basis for cost calculations. While it may be that an engineer could make the calculation on the basis of the data in the record, we cannot in a case like this proceed on the basis of calculations by counsel any more than we can accept a rationale by counsel that is not in the Commission's findings. Hence the case must be remanded for consideration in the light of *Conway*.
>
> "A commission engaged in consideration of rate profiles in the light of *Conway* at the outset may also discern a question as to the reasonableness of a classification that treats all industrials as a single class, distinct from municipals, on the basis of underlying timing of peak load, when the utility's rate structure does not set the demand and energy charges in terms of the time of peak load of the customer. If a substantial number of industrial consumers have their peak load at a time roughly the same as those of the cities, there is a substantial ousting from the market with no difference in conditions of service. And when

there is a competitive advantage to the utility in blanketing such industrials along with other industrials (whose peak characteristics may produce cost savings), there is room for concern on the part of the regulating commission." 584 F.2d at 1057-58.

There is, in short, no way to determine whether the electric utility rate structures are discriminatory without a detailed technical investigation and analysis of the rates and of their components.

The existence of a price squeeze is a question further complicated by the fact that differing ratemaking procedures employed by different regulatory commissions virtually mandate a differential of some magnitude between and among the resulting rates. For example, the Indiana Commission, upon receipt of a petition from I&M that an adjustment in its retail tariffs is required, establishes the test year to be employed; I&M thereupon prepares a cost of service study for the test year so designated, together with its claim of a fair and reasonable return on a fair value rate base. Only then are revenue deficiencies determined and a request for specified rate relief made. To date, the Indiana Commission has required the use of an *historic test year*. By contrast, FPC regulations now require, for all rate increases in excess of $1 million, the use of a *prospective test year*. 18 C.F.R. §35.13(b)(1) (1977). Unless all costs remain static between the historic test year designated by the Indiana Commission and the prospective test year utilized by FPC, some differential between the retail and wholesale rates is virtually inevitable.

FPC's expertise is thus required to determine the existence of an anticompetitive price squeeze prior to the

consideration of appropriate remedies by any forum. Thus, in *Pennsylvania Power & Light Co.*, FPC Docket No. E-8927, Order Affirming Initial Decision at 5 (March 24, 1977), FPC ruled that

> "[t]here is no evidence of any anticompetitive purpose, the [wholesale] rates are at the bottom of the zone of reasonableness and it appears that there still is and can be competition for industrial loads."

Manifestly, if there is no anticompetitive price squeeze, an issue that FPC is required to resolve under *Conway*, there is no need for consideration by the district court of any of Municipalities' price squeeze allegations.[16]

If FPC should find, in accord with the detailed procedures for rendering *Conway* determinations set forth in its Order No. 563, issued on March 21, 1977,[17] that an anticompetitive price squeeze does exist, FPC has the power under *Conway* to provide a remedy by adjusting the wholesale rates at least to the lower range of the zone of reasonableness. In *Carolina Power & Light Co.*, FPC Docket No. ER 76-495 (Phase II), Initial Decision of the Administrative Law Judge at 82 (Sept. 7, 1977), certain municipalities which there intervened conceded that their proposed cost of service adjustments, if adopted, would eliminate the price squeeze of which they complained. Thus, given the remedial powers of FPC as provided in *Conway*, there is

16. In order to prevail in this action, plaintiffs would have to establish that I&M has reached a decision artificially "to depress certain retail revenues" (426 U.S. at 279), or that I&M artificially raised its wholesale rate, a rate that FPC has full power to adjust within the zone of reasonableness.

17. 42 Fed. Reg. 16131 (March 25, 1977), rehearing denied, May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977).

no way to know whether a price squeeze exists, or whether FPC's power to remedy such a price squeeze is adequate, until FPC has fixed the wholesale rate. While we believe that it would disregard the proper allocation of functions between FPC and the district court to have FPC forced to operate under the threat of a stay which would be naturally disruptive of orderly administrative procedure, I&M submits that, at the very least, the district court should stay its hand pending FPC determination of the threshold questions that FPC is mandated to resolve under *Conway*.

Conclusion

The decision of the Court below ignores what I&M submits to be the manifest, although unstated import of *Conway*, that the Federal Power Commission (now the Federal Energy Regulatory Commission) has exclusive or at least primary jurisdiction over anticompetitive price squeeze allegations. The Court below also failed to give proper weight to the rulings of this Court in *Silver, Gordon* and *NASD* from which emerge the principle that the existence of pervasive regulatory controls, whether exercised or not, ousts the district court of its antitrust jurisdiction. The decision of the court below will lead to a massive duplication of effort between federal courts and agencies equipped to deal with public utility rates. The decisions of this Court clearly provide the self-protective guides for avoiding so harmful and egregious a result, and the court below erred in failing to invoke and apply them. The Court should review this result and reverse.

We take the liberty of suggesting that if this Court should consider the errors below so clear as not to require the Court to put this case on its calendar for oral argument, this matter can be effectively handled by summary reversal, as was done in *Federal Power Commission* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968), with appropriate directions to the Court below.

Respectfully submitted,

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November 14, 1977

APPENDIX

Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d:

"§824d. Rates and charges; schedules; suspension of new rates.

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilitities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged,

or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Sherman Act §2, 15 U.S.C. §2:

"§2. Monopolizing trade a misdemeanor; penalty.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act §4, 15 U.S.C. §15:

"§15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act §15, 16 U.S.C. §26:

"§26. Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Order and Judgment of the Court of Appeals

OPINION BY JUDGE CUMMINGS

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 16, 1977

Before:

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 76-2226

CITY OF MISHAWAKA, INDIANA, *et al.*,
Plaintiffs-Appellees,

vs.

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana

South Bend Division

No. S-74-72-Civil

Judge Grant and Judge Sharp

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the said District Court in this cause appealed from on May 1, 1975, and October 22, 1976, are affirmed, with costs, in accordance with the opinion of this court filed this date.

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 76-2226

CITY OF MISHAWAKA, INDIANA, *et al.*,
Plaintiffs-Appellees,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S-74-72-Civ.—ROBERT A. GRANT and ALLEN SHARP, *Judges.*

ARGUED APRIL 28, 1977—DECIDED AUGUST 16, 1977

Before CUMMINGS, TONE and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* One Michigan and nine Indiana municipalities, members of the Indiana & Michigan Municipal Distributors' Association, filed this antitrust action against defendant, a vertically integrated electric power company which generates, transmits and delivers electric power both to its wholesale customers, including

plaintiffs, as well as directly to its own retail customers. Each plaintiff operates its own electric utility through which it purchases wholesale electric power from defendant, then selling and distributing it at retail to industrial, commercial, and residential customers within its corporate limits and in nearby areas.

According to the complaint, defendant is the only firm within its service area that transmits and wholesales electric power and is the plaintiffs' only outside source of supply for wholesale electric power. Eight of the plaintiffs depend on defendant for all the electric power they distribute and sell to their retail customers. The other two plaintiffs, which operate generating facilities, depend on defendant for more than 90% of their requirements for electric power distribution and sale to their retail customers.

Plaintiffs alleged that defendant dominates and controls the distribution and sale of retail electric power within its service area and has acquired four of the twenty municipal electric utilities there since 1957 and unsuccessfully attempted to acquire a fifth. According to plaintiffs,

> "The defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%." (Complaint ¶6.)

Plaintiffs have charged defendant with intentionally monopolizing and attempting to monopolize interstate trade and commerce in the distribution and sale of retail electric power, in violation of Section 2 of the Sherman Act (15 U.S.C. §2), by requiring them and other municipalities to

pay since January 13, 1973, a new wholesale price which is substantially higher than the retail price it charges its own industrial customers. Because of this "price squeeze," the municipalities cannot sell electric power to their own industrial customers at prices that compete with defendant's retail prices. One consequence is that defendant may be able to lease Fort Wayne, Indiana's electric utility system for 35 years. Fort Wayne is the largest city within the defendant's service area which still operates its own electric utility. Other alleged consequences of the new wholesale price are:

1. Plaintiffs' ability to compete with defendant for retail and industrial customers has been impaired.

2. In those municipalities that have absorbed the difference between defendant's higher wholesale price and its lower retail industrial prices, pressure has been put on the municipalities to sell or lease their electric utilities to defendant rather than to continue generating operating losses.

3. In those municipalities that increase their industrial retail prices to the level of the defendant's higher wholesale price to them, the disparity between the municipalities' higher retail industrial prices and defendant's lower retail industrial prices threatens to cause the municipalities' industrial customers to exert pressure on the municipalities to sell or lease their electric utilities to defendant so that those customers can purchase electric power at defendant's lower prices.

By a September 30, 1976, amendment to the complaint, plaintiffs alleged that since July 27, 1976, defendant required them and other municipalities to pay a new higher

wholesale price for electric power, resulting in their financial inability to buy power at the defendant's new wholesale price and sell it to industrial customers at prices competitive with defendant's retail prices. In its answer to this amendment, defendant admitted that the Federal Power Commission permitted its higher wholesale rates to become effective on July 27, 1976, subject to refund.[1]

Plaintiffs requested a declaratory judgment that defendant had violated Section 2 of the Sherman Act and an injunction under Section 16 of the Clayton Act (15 U.S.C. §26) against violating it in the future. They also sought an order ending defendant's present rate structure which requires plaintiffs to pay a higher wholesale price to defendant for electric power than the retail prices at which it sells to its own industrial customers. Under Section 4 of the Clayton Act (15 U.S.C. §15), plaintiffs claimed damages in excess of $1 million before trebling. The municipalities also sought attorneys' fees.

Subsequently, on May 1, 1974, defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction or for failure to state a claim or, in the alternative, to stay the court proceedings until the Federal Power Commission should conclude its regulatory proceedings involving defendant's post-January 13, 1973, rates to wholesale customers. Defendant and the Indiana & Michigan Municipal Distributors' Association (of which plaintiffs are members) were parties to these proceedings before the Commis-

1. In June 1975, defendant filed an answer containing three counterclaims against plaintiffs. That pleading need not be summarized herein because it is irrelevant to the issues involved on the interlocutory appeal.

sion. On May 1, 1975, Judge Grant denied that motion and at the same time filed an extensive opinion disposing of defendant's arguments (App. 11-29). In the opinion, Judge Grant noted that in March 1972, the Indiana Public Service Commission set defendant's new higher retail rates and that in March 1973, the Michigan Public Service Commission approved an increase in defendant's retail rates. Both of these actions were instituted by defendant's July 30, 1971, petitions for new rates filed with each of the state Commissions. In June 1972, defendant submitted proposed increases in the rates charged to its wholesale customers to the Federal Power Commission. The new rates were later made effective on August 13, 1972,[2] but the Commission provided that if it determined that said rates were unjust or unreasonable, it might order defendant to refund the excess to its customers. The Commission began its hearings on the lawfulness of these new wholesale rates on January 31, 1974.

Defendant contended that its retail rates, set by the state utility commissions, were immune from attack under the Sherman Act. The court held that under *Parker v. Brown*, 317 U.S. 341, it did not have authority to intrude upon the Indiana and Michigan Public Service Commissions' approval of defendant's retail rates. However, after distin-

2. On August 13, 1972, the Commission suspended the use of these rates until January 13, 1973, the date involved in the original complaint herein. After an appeal to the District of Columbia Circuit by defendant on the grounds that the effective date should be July 14, 1972, the Court proclaimed July 14, 1972, to be the effective date but only allowed defendant to collect the difference between its old and new rates from December 14, 1972, onward. *Indiana & Michigan Electric Co. v. Federal Power Commission*, 502 F.2d 336 (D.C. Cir. 1974), certiorari denied, 420 U.S. 946.

guishing *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, and *Pennsylvania Power Company v. Federal Power Commission,* 193 F.2d 230 (D.C. Cir. 1951), affirmed, 343 U.S. 414, the Court found that it had jurisdiction over the subject matter of the action, citing *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439; *Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156; and *Otter Tail Power Co. v. United States,* 410 U.S. 366. In particular, Judge Grant held that

> "Just as the Court in *Otter Tail* was hesitant to conclude that the authority of the Federal Power Commission to order interconnections was intended to 'be a substitute for, or to immunize Otter Tail from, anti-trust regulation for refusing to deal with municipal corporations,' this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structure." (mem. op. at 16).

Judge Grant stated that if the Federal Power Commission finally found the defendant's new wholesale rates to be just, the court might be forced to order defendant to initiate a new rate structure, eliminating the dual price system of higher wholesale prices relative to retail prices. On the other hand, if the Commission should find the new wholesale rate to be unjust, he might only enjoin defendant from any future dual system. Consequently the court held that plaintiff had not failed to state a claim upon which relief could be granted.

In conclusion, Judge Grant refused to stay the action until the Federal Power Commission should hand down

a final decision because "the lawfulness of the defendant's wholesale rate is not determinative of the issue before" the court (mem. op. 19). The district court ended its opinion as follows:

> "Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruled on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result." (*Id.*)

Thereafter the case was reassigned to Judge Sharp. On October 22, 1976, he denied defendant's motion to reconsider Judge Grant's order of May 1, 1975. Thereupon, an interlocutory appeal was taken to this Court and allowed pursuant to 28 U.S.C. §1292(b). We affirm.

I. *Exclusive Jurisdiction*

When the district court handed down its opinion refusing to dismiss the complaint and to grant a stay, the Federal Power Commission had ruled that this alleged dual price system and its anti-competitive effects were beyond its jurisdiction (mem. op. 14).[3] However, in *Federal Power*

3. The Indiana & Michigan Municipal Distributors' Association sought review of the FPC decision to eliminate from the case all testimony, exhibits and consideration of the price squeeze issue.

(footnote continued on next page)

Commission v. Conway Corp., 426 U.S. 271, the Supreme Court subsequently held that such an anti-competitive price squeeze between jurisdictional wholesale rates and non-jurisdictional retail rates should be considered by the Commission in fixing rates for interstate wholesale sales. Speaking for a unanimous Court, Mr. Justice White said the Commission can take retail rates into consideration in setting the wholesale rate even though they are outside its jurisdiction. 426 U.S. at 279-282. The Court explicitly approved the District of Columbia Circuit's conclusion that

> "When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C. at 53, 510 F.2d at 1274. (Footnote omitted.)" 426 U.S. at 279.

Appealing to the District of Columbia Circuit, IMMDA requested the FPC to confess error in light of *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, and obtain a remand to consider the price squeeze issue. On August 13, 1976, the FPC filed such a request. In an initial decision of August 19, 1976, in the wholesale rate case commenced in June 1972, the administrative law judge recommended that the price squeeze issue be resolved in further proceedings. This was in line with the parties' agreement to dispose of the 1972 wholesale rate case by a financial settlement based on the initial decision without resolving the anti-competitive allegations (Pl. Br. 9-10). These facts were brought to the district court's attention before its October 22, 1976, denial of defendant's Motion to Reconsider, Vacate, Set Aside and Amend [the] Court's Order of May 1, 1975 (D. Br. 5-6). The settlement was approved by the FPC in an order of June 1, 1977.

Such a remedy would only operate against the jurisdictional rate.[4]

Nothing in the Supreme Court's opinion in *Conway* suggests exclusive jurisdiction, as defendant concedes (D. Br. 32).[5] Indeed, *Conway* suggests that the FPC rem-

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4. A new regulation, 18 C.F.R. §2.17, entitled "Price discrimination and anti-competitive effect (price squeeze issue)," was issued on March 21, 1977, to implement the Commission's mandate under *Conway*. In the order issuing the regulation, provision was made for the state commissions to be kept informed but, of course, no suggestion was made to force them to change the non-jurisdictional retail rates:

> "Both the Federal Power Commission and the NARUC [National Association of Regulatory Utility Commissioners] Board [of Consultants] recognize that state commission participation in rate proceedings before the Commission, particularly in cases involving retail and wholesale rate comparisons, would be desirable, and awareness of the state commission's views on price squeeze issues would be valuable. We, therefore, adopt the NARUC Board's recommendation that in all cases where price squeeze is at issue, the state commission, agency or body which is responsible for regulation of retail rates in the state affected shall be included in the service list maintained by the Secretary under 18 CFR 1.17(c) as if that state commission, agency or body had intervened in the proceeding. In proceedings where the state commission does not take an active part, the NARUC Board recommends that the Commission encourage FPC staff to confer with state commission staff for the purpose of acquiring information particularly within the knowledge of the state commissions in order to gain a more complete picture of the competitive relationship of respective wholesale to retail rates." (D. Rep. Br. App. A8-A9.)

5. Defendant points to one sentence of dicta in Judge Leventhal's opinion for the D.C. Circuit in *Conway* arguably to the contrary:

> "The FPC's position would leave a regulatory gap—no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates." 510 F.2d at 1272.

Judge Leventhal's opinion does not consider antitrust aspects at all. When read in the context of the opinion as a whole, it is clear that the "institution" meant a regulatory administrative body.

edy is limited to setting the jurisdictional rate somewhere above the lower boundary of the zone of reasonableness. A rate set so low that it would fail to recoup fully allocated wholesale costs seems to be beyond the Commission's power. 426 U.S. at 278. If the retail rates have been set so low by the state utility commissions that a price squeeze could only be fully remedied by setting the wholesale rates below the lower boundary of the zone of reasonable recovery for fully allocated costs, the squeeze would go unremedied to the extent a wholesale rate set at the lower boundary of the zone of reasonableness did not cure the problem. Although *Conway* was brought to the district court's attention, it refused to vacate its order declining to dismiss the complaint and to stay the action.

Subsequent to *Conway,* the Supreme Court decided *Cantor v. Detroit Edison Co.,* 428 U.S. 579, refusing to exempt Detroit Edison's light bulb exchange program from the federal antitrust laws even though it was an approved element of the state rate tariff filed with the Michigan Public Service Commission. Given a complaint that details conduct which, if true, would constitute a substantive antitrust violation, Justice Stevens described two classes of situations involving the interaction of state and federal law where Sherman Act jurisdiction would, nevertheless, be defeated. First, Congress in passing the Sherman Act may not have intended for the Act to apply, in the first instance, to state action. *Parker v. Brown,* 317 U.S. 341. Secondly, although originally intended to be covered by the Sherman Act, certain conduct may have become exempted from the Act.

In a section of his opinion commanding only a four-judge plurality, Justice Stevens concluded that in *Parker* the

> "only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of §7 of the statute, was also subject to its prohibitions." 428 U.S. at 591.

As in *Cantor,* the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, *Parker v. Brown* does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrences in *Cantor* give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintain a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under *Parker v. Brown.*

Having decided that the Sherman Act applies in the first instance to the conduct at issue here, we must decide whether an exemption nonetheless has been worked. Justice Stevens, in a portion of *Cantor* subscribed to by a majority of the Court, suggested two geneses for such an exemption. First, it might be unjust to hold a private citizen liable for conduct imposed by the direct command of the

sovereign.[6] Secondly, if the sovereign is already regulating an area, Congress may not have intended to superimpose the antitrust laws as an additional and perhaps conflicting regulatory scheme.[7]

In *City of Shakopee v. Northern States Power Co.*, Civ. No. 4-75-591 (D. Minn. 1976), a post-*Cantor* case involving a virtually identical dual rate structure creating a price squeeze between the wholesale and retail sale of electric power, Judge Lord concluded that no exclusive jurisdiction existed in the Federal Power Commission because an exemption from the antitrust laws could not be implied. Judge Lord interpreted the first genesis for exemption under *Cantor* to be based on the reasoning that

6. Although the facts of *Cantor* limited Justice Stevens' consideration to the state sovereign, a finding that conduct arising from the command of the federal sovereign is subject to antitrust liability may be assumed to be similarly unjust.

7. If the sovereign is the federal government, the question reduces to the traditional problem of exclusive jurisdiction. Here the conceptual framework is a federal statute post-dating the Sherman Act lodging the responsibility for regulating the conduct in issue in some federal agency and impliedly repealing the application of the Sherman Act as to this specie of conduct.

If the sovereign is the state government, an implied repealer of a federal law such as the Sherman Act is of course foreclosed by the Supremacy Clause. Presumably, the exemption is created here on the conceptual framework that Congress did not intend the Sherman Act to apply to areas of the economy pervasively regulated by the states. Unlike the *Parker* exclusion, this exemption would not derive from the character of a state's involvement with certain conduct but rather with the quality and scope of the regulatory mechanism imposed by the state over such conduct. The state commissions of Indiana and Michigan are not alleged to have any power to regulate the price squeeze in any sense. Since this conduct is not being regulated by the state commissions, Sherman Act jurisdiction of course is not ousted in favor of state regulation. The defendant does not contend otherwise.

> "if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (mem. op. 6.)

Accordingly, the court noted that, as here, defendant Northern States Power Co. could have avoided the alleged monopolistic position by "tailoring its applications to allow for competitive 'wholesale' and 'retail' power rates" (mem. op. 7) and that, given such company autonomy, this position was not "necessary" to the functioning of the regulatory scheme.

With respect to implying a repealer of the antitrust acts, Judge Lord began with the now settled axiom that after *Otter Tail Power Co. v. United States*, 410 U.S. 366, "there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor, supra*, at 596 n. 35. Since the antitrust laws are not generically superseded by the regulation of electric utilities,[8] the only question open to debate is whether "the particular application of the [antitrust laws] is irreconcilably repugnant to the operation of the regulatory scheme." *Id.* Judge Lord decided that there was "little or no apparent conflict be-

8. In order to imply a general exemption for an economic sector of an industry, mere conflicting standards are not enough. This aspect of a regulatory agency's jurisdiction must be "imperative in the continued effective functioning" of the regulatory scheme over the industry as a whole. *Cantor, supra*, at 596-597 n. 36 and n. 37. Since *Cantor* distinguished and refused to apply *Gordon v. New York Stock Exchange*, 422 U.S. 659, perhaps defendant's principal case on this ground, no purpose would be served in discussing it further here. See 428 U.S. at 596-597 n. 36.

tween applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory system" (mem. op. 5). As in *Shakopee,* the price squeeze alleged in our case

> "is not between rates set by one regulatory agency, as was the case in *Georgia* [*v. Pennsylvania R. Co.*, 324 U.S. 439], but rather is between the 'wholesale' rate set by the FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct." (mem. op. 7 n. 6.)

If plaintiff proves it is entitled to relief on the Sherman Act claim asserted in its complaint, the Federal Power Commission's regulatory process would not be disturbed by the court's awarding damages for past anti-competitive conduct or by enjoining future anti-competitive conduct by defendant in making and promoting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates.

Indeed the Federal Power Commission has conceded that it does not have exclusive jurisdiction over conduct such as that alleged here. Following Judge Lord's denial of Northern States Power's motion to dismiss, *Shakopee* is proceeding, we are advised, before the district court and the Federal Power Commission in tandem. On May 23, 1977, the Federal Power Commission released an order in *Northern States Power Company,* FPC Docket No. ER 76-818, stating that the Commission's examination of the

alleged price squeeze would not affect the district court action in *Shakopee* because

> "That action seeks damages for allegedly anticompetitive activity that occurred in the past. As the District Court noted in its October 18, 1976, order denying Northern States' motion to dismiss, should Shakopee prove itself entitled to relief the regulatory process would not be disrupted by an award of damages for past conduct nor by an enjoining of certain future conduct. These remedies are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct."

This ruling equally applies here. Therefore, it is clear that defendant is wrong in asserting that the Federal Power Commission has exclusive jurisdiction over this matter.

II. *Primary Jurisdiction*

The more difficult question is whether the Federal Power Commission has primary jurisdiction over the price squeeze. Primary jurisdiction is concerned with the proper allocation of responsibilities between the administrative agencies and the courts. "Even when [antitrust actions] and remedies survive and the agency in question lacks the power to confer immunity from [antitrust] liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure

'[u]niformity and consistency in the regulation of business entrusted to a particular agency' or where

> "'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conference v. United States,* 342 U.S. at 574-575." (*Nader v. Allegheny Airlines,* 426 U.S. 290, 303-304).

The defendant argues that since "some facets of the dispute * * * are within the statutory jurisdiction of the [Federal Power] Commission," *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 302—here the *Conway*-dictated duty to set the jurisdictional rate with an eye to any price squeeze between it and the non-jurisdictional rate—the Federal Power Commission must be deemed to preempt antitrust jurisdiction. However, that position was also foreclosed by *Otter Tail Power Co., supra.* There only the dissenting Justices would have required the antitrust court to defer to the Commission proceeding. 410 U.S. at 392-395. The other Justices affirmed a decree under Section 2 of the Sherman Act (except in one respect immaterial here) without requiring a stay where there was only a potential conflict between the federal judicial decree and a future order of the Federal Power Commission. 410 U.S. at 376-377. Any suspicions that the 4-3 vote in *Otter Tail* impairs its authority seem wholly unwarranted in light of the *Cantor* majority's repeated citations of it with approval. See

also *Gulf States Utilities Co. v. Federal Power Commission,* 411 U.S. 747, 758.

Even if it cannot be maintained as a matter of course that as between the dual jurisdiction in the district court and in the Federal Power Commission the jurisdiction in the Commission is primary, it may be that deferral to the Commission makes sense as a matter of judicial administration. If a significant inconsistency between the antitrust action and the regulatory scheme which was certain to arise could be specifically shown to be avoidable by letting the Commission proceed first, deferring to the Commission would be advisable. In addition, if the "adjudication of th[e] dispute by the Commission promises to be of material aid in resolving the [antitrust] immunity question," *Ricci, supra,* at 302, or will advance the Court's fact-finding capacity, it may be desirable to hold the antitrust action in abeyance pending the resolution of the proceeding before the Commission. Nevertheless, we hold that the Federal Power Commission does not have primary jurisdiction over the price squeeze.

A. *Uniformity*

Where uniformity and consistency of the regulatory scheme are at stake, primary antitrust coverage does not necessarily follow even when there is a statutory grant of express immunity as to certain other conduct approved by a federal agency. *Mt. Hood Stages, Inc. v. Greyhound Corp.,* —— F.2d ——, —— (9th Cir. 1977) (slip op. at 1200). Where there is no statutory grant of antitrust im-

munity, so that the argument that Congress intended "conduct not within the exemption [to remain] subject to the antitrust laws" is foreclosed (*id.*), the uniformity interests in primary administrative jurisdiction are correspondingly strengthened. But as Chief Judge Browning added:

> "Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency, as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy, as it did in this instance." (*Id.*)

Indeed, as noted in *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 758-759, the Federal Power Act does not preclude the operation of the antitrust laws even though the Federal Power Commission is required to give weight to antitrust policy. There Justice Blackmun, speaking for six members of the Court, declared that the Federal Power Commission should consider antitrust and anti-competitive issues before authorizing the issuance of securities under Section 204 of the Act (16 U.S.C. §824c) in order to establish "a first line of defense against those competitive practices that might later be the subject of antitrust proceedings" (411 U.S. at 760). This of course does not mean, as defendant urges (Reply Br. 5-6n. *), that a district court which, as here, has assumed jurisdiction over a price squeeze two years before the Commission agreed to consider it must withhold relief that (as the district court has already indicated) will not interfere with the Commission's rate-making function. In fact, primary administrative jurisdiction based on uniformity grounds is not even an issue in such a factual setting.

As in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 455, 457, plaintiffs are seeking to enjoin conduct violative of the Sherman Act and to recover damages therefor. That relief, if appropriate to remedy a proven violation of the antitrust laws, would cause defendant to end its purported current price squeeze practice but need not interfere with rates already approved by the state and federal commissions. The antitrust and regulatory régimes accommodate and supplement each other in order to prove full protection from anti-competitive practices. Here too the remedies afforded under the two statutes can be meshed. As in *Mt. Hood Stages, supra*, —— F.2d at —— (slip op. 1201), no plain repugnancy exists between this federal regulatory statute and the Sherman Act as applied to defendant's conduct, nor is it necessary to exempt that conduct from antitrust restraints to make the regulatory statute work. In truth, as recognized as long ago as *Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co.*, 194 F.2d 89, 97-99 (4th Cir. 1952), certiorari denied, 343 U.S. 963, Part II of the Federal Power Act, which contains Section 205 involved in this case, is not repugnant to the antitrust laws and therefore does not supersede them.

In the court below, defendant in effect recognized that the Commission cannot afford the requested relief to plaintiffs because defendant stated it was

> "aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the differences in rates charged by [defendant] I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates" (mem. op. 9).

Nor does *Conway* guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to

eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness limit. Primary jurisdiction is not a doctrine that requires an exercise in futility. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686. Thus antitrust relief is needed for full protection from the anti-competitive conduct alleged in the complaint.

If plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be affording a remedy that would "starkly conflict with the explicit statutory mandate of the Federal Power Commission * * * [or] improperly preemp[t] the jurisdiction of the Federal Power Commission * * *." *Otter Tail Power Co., supra,* 410 U.S. at 395 (concurring and dissenting opinion of Justice Stewart). As shown from the opinion below and from the opinion *Shakopee, supra,* the district court intends to apply the antitrust laws "to the public utility industry only to the extent that the antitrust claims asserted are not within the reach of the regulatory agency's supervision," the very standard recommended by defendant (Br. 21). Under *Otter Tail Power Co., supra,* and *Gulf States Utilities Co., supra,* in fashioning any relief that may be warranted under the Sherman

Act, the judiciary must be careful to avoid or resolve any inconsistency with Section 205 of the Federal Power Act. We are confident that the district court will observe this stricture.

Indeed the opinions of the district courts in this case and in *Shakopee* show that they do not intend to interfere with the Federal Power Commission's jurisdiction, because if the Commission should find the respective defendant's higher wholesale rates to be just, the courts would, on proof of violations of Section 2 of the Sherman Act, order the defendants to initiate new rate structures eliminating the dual price system of higher wholesale prices. If the Commission should find the present wholesale rates to be unjust, then the courts would only enjoin the defendants from future dual systems violative of the Sherman Act. Both district courts noted too that it would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial. Therefore, a stay is unnecessary to avoid a clash between the antitrust laws and the Federal Power Act.

B. *Agency Expertise.*

Nor is a stay warranted on the grounds that the Federal Power Commission's expertise will materially advance the district court's fact-finding capacity or aid the district court's determination of the extent of any possible antitrust immunity.

As *amici curiae* "Illinois Municipals."[9] have stated, *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, has

9. Cities of Batavia, Geneva, Naperville, Rock Falls and St. Charles, Illinois.

no bearing here because the district court does not need to know the Commission's expert views on what constitutes a just and reasonable rate "as a prerequisite to a determination of whether defendants' activities violate the antitrust laws" (Br. 24). Also, the *Ricci* Court thought the Commodity Exchange Act probably limited the applicability of the antitrust laws there (409 U.S. at 302-304) whereas no such limitation exists here. *Cantor, supra; Otter Tail Power Co., supra.* Under the facts of the instant case, where the district court has first asserted jurisdiction over the antitrust proceedings, it may continue its probe. *California v. Federal Power Commission,* 369 U.S. 482; *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.,* 184 F.2d 552, 562-566 (4th Cir. 1950), certiorari denied, 340 U.S. 906.

III. *Discretionary Stay*

Assuming that a discretionary stay could be appropriate even when primary jurisdiction is not in the Federal Power Commission, the district court certainly did not abuse its discretion here. Indeed, the equities weigh heavily in favor of the plaintiff municipalities. The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. §824d). Under that provision, a public utility files its rate increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day

to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972, application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.

Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." FPC Order No. 487, 50 FPC at 127 (1973).

Under this procedure, the price squeeze can continue between the time the Commission allows the rates to go into effect and its final order, for the new *Conway* remedy as to price squeezes does not become effective until then. Thus if a stay were granted to defendant, plaintiffs and customers in similar positions would be unable to secure any relief from price squeezes like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

> "Delay, combined with the multiple rate increases, could mean that the customer has been put out of

> business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time.

IV. *Disposition*

At oral argument, we were advised that on January 14, 1977, defendant requested the Federal Power Commission to approve a negotiated settlement between it, these plaintiffs and others for the period from January 13, 1973, to July 27, 1976, when defendant's new wholesale rate schedule became effective. This settlement was approved on June 1, 1977. See note 3 *supra*. Upon remand, the district court will have to determine whether this settlement agreement has mooted any of the antitrust claims in this case. Of course, the claims stemming from the July 27, 1976, higher wholesale prices are still active.

While we are holding that the district court need not stay further proceedings herein, we agree with Judge Grant that if the district court should ever find it necessary to ascertain particular Commission action in order to decide the exact scope of antitrust damages, or for other purposes, the court may then stay its hand for the purpose of awaiting the Commission result (mem. op. 19).

The orders of May 1, 1975, and October 22, 1976, are affirmed.

Order and Memorandum of the District Court, May 1, 1975

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,

Municipal Corporations,

Plaintiffs,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,
a Corporation,

Defendant.

ORDER

The defendant, Indiana & Michigan Electric Company, filed a motion to dismiss the above entitled action pursuant

to Rule 12, F.R.C.P., or, in the alternative, that the proceeding be stayed in the event that defendant's motion to dismiss be denied.

The defendant seeks to dismiss on the grounds that this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief may be granted.

The defendant has also filed a motion for leave to file a supplementary affidavit in support of its motion to dismiss or in the alternative to stay, which motion is DENIED for the reasons stated in the following Memorandum.

After reviewing defendant's motion, the parties' briefs, and oral argument having been held,

IT IS THE ORDER OF THE COURT that defendant's motion to dismiss or in the alternative to stay be, and the same is, hereby DENIED.

ROBERT A. GRANT
District Judge

ENTER: May 1, 1975

MEMORANDUM

The plantiffs, City of Mishawaka, Indiana; City of Niles, Michigan; Cities of Columbia City, Bluffton, Garrett, and Gas City, Indiana; and the Towns of Frankton, Warren, New Carlisle, and Avilla, Indiana, filed the present action on March 25, 1975, against Indiana & Michigan Electric Company (hereinafter I & M). Plaintiffs have based jurisdiction of this action on Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, and allege that the defendant, I & M, has monopolized and attempted to monopolize inter-

state trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

Plaintiffs in their complaint state that they are municipalities which operate their own electric distribution systems; that they are within the service area of the defendant, I & M; and that they sell and distribute the electric power at retail to industrial, commercial, and residential customers within their corporate limits and in nearby areas.

Plaintiffs describe I & M as a vertically integrated electric power company which generates electric power, transmits the power throughout its service area, and delivers the power to its wholesale customers, including the plaintiffs, and also directly to its retail customers.

Plaintiffs allege that the defendant company is the only firm within their service area engaged in the business of transmitting and selling electric power at wholesale and, thus, the only outside source of supply for wholesale electric power available to them. The complaint states that plaintiffs, Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; New Carlisle, Indiana; and Avilla, Indiana, depend on the defendant for all of their requirements of wholesale electric power. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generating facilities, allege that they depend on the defendant for more than 90% of their requirements of electric power.

The plaintiffs further contend that the defendant dominates and controls the distribution and sale of retail electric power within its service area. They contend that the de-

fendant has increased its control of the retail market by acquiring municipal electric utilities. It is stated in their complaint that since 1957 the defendant has purchased the assets of four of the twenty (20) municipal utilities within its service area, has absorbed their retail distribution into the I & M system, and has taken over their retail industrial, commercial and residential customers, as follows: Kendallville, Indiana (1957), Decatur, Indiana (1959), Portland, Indiana (1963), and Albion, Indiana (1966). Because of this, the plaintiffs contend that the defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated systems serve retail customers in fewer than 10%.

Plaintiffs allege that the defendant, I & M has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2, in the following ways:

(1) Since January 13, 1973, the defendant has required municipalities to pay a new wholesale price for electric power. The new wholesale price is substantially higher than the retail price the defendant company charges its own industrial customers. This causes the municipalities to be unable to buy power at the defendant's wholesale price and sell it at competitive prices.

(2) On March 8, 1974, after fourteen months of requiring the city of Fort Wayne to pay more for wholesale electric power than the defendant's own retail industrial cus-

tomers pay, and after more than twenty (20) years of selling retail electric power to its own customers in the Fort Wayne area for less than it sells retail power elsewhere, the defendant obtained the agreement of the city officials that the city of Fort Wayne will lease its entire electric utility system to the defendant for thirty-five (35) years. Under the lease agrement to be submitted to the voters, I & M will take possession of all the property and facilities of the city's electric utility and will operate the electric distribution system. The defendant will take over the city's retail customers and will sell electric power directly to them.

The plaintiffs further contend that the adoption of a wholesale price to municipalities in excess of the retail prices at which it sells electric power has caused and threatens to cause the following consequences:

(1) It impairs the plaintiffs' ability to compete against the defendant.

(2) In municipalities that have absorbed the difference between the defendant's higher wholesale price and lower retail price, the electric utility's loss of earning exerts pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant.

(3) In the municipalities that increase their own industrial retail prices to the level of the defendant's higher wholesale price, and above the level of the defendant's lower retail industrial prices, this situation threatens to cause the municipalities' industrial customers to exert pres-

sure on the municipalities to sell or lease its utility to the defendant so they can purchase electric power at the defendant's lower price.

It is the plaintiffs' contention that these alleged practices have been done with the intent, and have the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail in violation of Section 2 of the Sherman Act and have injured the municipalities in their business and property. Plaintiffs thus seek declaratory and injunctive relief and treble damages.

The defendant, I & M, has responded to plaintiffs' complaint by filing a motion to dismiss or in the alternative to stay, pursuant to Rule 12 of the F.R.C.P. The defendant's motion to dismiss is based upon the following grounds: The Court lacks jurisdiction over the subject matter of the action and the plaintiffs' complaint fails to state a claim upon which relief may be granted.

In the motion to stay, defendant contends that in the event the Court does not dismiss this action, the Court should order this proceeding stayed until the conclusion of the regulatory proceedings before the Federal Power Commission involving defendant's rates charges to wholesale customers, including plaintiffs, to which proceedings defendant and the Indiana & Michigan Distributors Association (of which plaintiffs are members) are parties.

Subsequent to a hearing on defendant's motion to dismiss, or in the alternative to stay, and while defendant's motion was under advisement by the Court, the defendant filed a motion for leave to file supplementary affidavit and

exhibits in support of its motion to dismiss or in the alternative to stay. The Court finds from reviewing defendant's supplementary affidavit and exhibits that they are submitted in support of the proposition that the dual pricing structure of which plaintiffs complain does not exist and that plaintiffs are in fact paying less under the present wholesale rates than they would pay under the applicable retail tariff and, therefore, there is no basis upon which the plaintiffs can claim injury. The Court finds that the material which defendant seeks to file, by way of supplementary affidavit and exhibits, is not material in support of its motion to dismiss or in the alternative to stay but, in fact, is material in opposition to the substantive issue of plaintiffs complaint, which issue is presently not before this Court. The present motion before the Court and the motion defendant seeks to supplement, involves the jurisdiction of this Court and not the merits of plaintiffs' complaint. If and when the merits of plaintiffs' complaint are at issue, the defendant will be allowed to present its opposition to plaintiffs' claim and the Court will then consider such material. The Court finding defendant's supplementary material to be irrelevant to the present motion, it is the Order of the Court that defendant's motion for leave to file supplementary affidavit and exhibits be denied.

In considering defendant's motion to dismiss or in the alternative to stay, the Court has had to become familiar with some of the proceedings that have gone on and are going on in the Public Service Commissions of Indiana and Michigan ("Indiana Commission" and "Michigan Com-

mission", respectively), and the Federal Power Commission ("Commission") with respect to the approval of retail and wholesale rates submitted by I & M since 1971. The following is a summary of what has occurred in the respective Commissions:

RETAIL RATES

Dates	*Action Taken*
July 30, 1971	I & M filed petition requesting the Indiana Commission to make an investigation and hold public hearings in regard to I & M's proposed new rates.
March 24, 1972	Indiana Commission issued an order setting I & M's retail rates for the State of Indiana. The rates were effective March 29, 1972.
July 30, 1971	I & M filed a petition with the Michigan Commission asking them to investigate and hold hearings on the proposed rate increase for Michigan.
March 20, 1973	The Michigan Commission granted an increase in the rates. The rates were effective March, 1973.

WHOLESALE RATES

June 13, 1972	Pursuant to 16 U.S.C. §824(d), I & M submitted proposed rate increases in the rates charged to wholesale customers to the Federal Power Commission.

Dates	*Action Taken*
August 11, 1972	Public hearings were ordered and the Indiana and Michigan Municipal Distributors Association (IMMDA) request to intervene in the proceeding was granted.
August 13, 1972	The Commission designated this date as the effective date for I & M's new rates and suspended the effective date of the new rates for five months thereafter, until January 13, 1973.
December 5, 1972	I & M appealed to the United States Court of Appeals in the District of Columbia Circuit, on the grounds that the effective rate date should be July 14, 1972. While it was *sub judice,* the Commission on January 31, 1974, commenced its hearings on the lawfulness of the proposed rates.
February 14, 1973	The Court of Appeals ruled favorably on I & M's petition, vacated the Commission's suspension order and remanded the proceeding to the Commission, with instructions that I & M's rates be made effective retroactive to July 14, 1972. A petition for rehearing was filed.

Dates	*Action Taken*
August 14, 1974	The rehearing was granted and the Court modified its order as follows: I & M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing, July 14, 1972, through December 13, 1972; I & M may collect the difference between its old and new rates for the period from December 14, 1972, through January 13, 1973. If the Commission determines that I & M's filed rates are unjust or unreasonable, it may order I & M to refund the amounts collected after December 13, 1972, in excess of the just and reasonable rates. *Indiana & Michigan Electric Company* v. *Federal Power Commission,* No. 72-2168 (D.C.Cir. 1974).
April 16, 1974	The hearings on the lawfulness of I & M's rates were concluded and a briefing schedule established, final briefs being due on September 3, 1974. It is expected that the final decision of the Administrative Law Judge will be appealed.

I—*Subject Matter Jurisdiction*

Defendant I & M contends that its retail rates which have been set by the Indiana Commission and the Michigan Commission are immune from attack under the Sherman

Act. It argues that it is a well settled principle of antitrust law that conduct which violates the Sherman Act, if undertaken by a private individual, is immune from attack under the Sherman Act if undertaken by the state or its agents acting in the scope of their authority, *Parker* v. *Brown,* 317 U.S. 341 (1943). I & M alleges that nothing in the Sherman Act is intended to restrain a state or its officers or agents from activities directed by its legislature. It is defendant's position that congress has pre-empted the authority over wholesale rates of electric utilities but has left the states sovereign with respect to the rates and regulations concerning retail sales within the states' borders. Therefore, the retail rates in Indiana and Michigan are subject exclusively to regulation by the Indiana and Michigan Commissions. Defendant states that because I & M's retail rates derive their authority and efficacy from the legislative commands of Indiana and Michigan and cannot operate or be effective without that command, they are immune from attack under the Sherman Act.

It is also the defendant's position that the Court cannot issue an order affecting the wholesale rates since they are within the exclusive or, alternatively, the primary jurisdiction of the Commission. Defendant contends that should the present proceedings not be terminated, they will result in an order determining the just and reasonable rates for I & M's wholesale customers, including the plaintiffs herein, and these wholesale rates will be subject to the Commission's approval as just and reasonable. I & M assert that the rates which plaintiffs attack are clearly within the Commission's regulatory domain. The defendant also acknowledges that anti-competitive conduct may be raised and con-

sidered by the Commission in its rate determination, but it may only deal with allegations of anti-competitive conduct that are specifically articulated and that are within its jurisdiction to remedy. I & M further agrees that the Commission has no power over the retail rates which are left to the regulatory power of the State Commissions. Because the Commission has no power over the retail rates, I & M is aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the difference in rates charged by I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates. The Commission also finds that its jurisdiction over wholesale rates is clear and that it cannot be limited by the state's action with respect to retail rates. It is the defendant's contention that the Commission cannot set wholesale rates at a level equal to or lower than the retail rates if the lower rate would not be adequate to cover the utilities' allocated cost-of-service or would result in an inadequate rate of return. To do so would result in an abdication of the Commission's statutory responsibility to set only just and reasonable rates.

The defendant sees the problem as one of inter-relationship of two separate statutory schemes. The Sherman Act has as its goal the determination of prices and services by the working of a free market. The Federal Power Act substitutes for competition the authority of a regulatory agency to supervise the rates and prices charged by electric companies on the grounds that the concept of prices set by free market competition has no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing

business. Thus the defendant contends that the antitrust laws may only be applied to the extent that the matter in question is not within the reach of the regulatory agency's supervision.

The plaintiffs in response to defendant's argument contend that the Court does have jurisdiction of the subject matter of this case. It is plantiffs' position that the use of monopoly power to prevent competition is a violation of the anti-trust laws over which this Court has jurisdiction. They rely on Section 2 of the Sherman Act, 15 U.S.C. §2. They further assert that Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, provide a right of action and remedies to private parties who are injured by violation of the Sherman Act.

The plaintiffs contend that the defendant's motion ignores the fact that this anti-trust action does not challenge the defendant's wholesale or retail prices, but challenges the defendant's act of allegedly monopolizing and attempting to monopolize the business of selling electric power at retail. Plaintiffs contend it does so by abusing its discretion to file wholesale and retail prices and by instituting a dual price structure that prevents competition and extends the monopoly control.

It is the plaintiffs' position that this Court will not be required either to issue an order raising the retail rates, or issue an order lowering the wholesale rates. Plaintiffs assert that the power to establish prices rests with the defendant utility, subject only to the requirement that it be within a zone of reasonableness and that they undergo agency review. It is the plaintiffs' position that the defendant it-

self has the power to eliminate the dual price system by changing its own price-setting practices and by making such new filings before one or more of the state or federal regulatory agencies as the defendant sees fit which will remove the allegedly unlawful disparity between the price at which the defendant sells electric power to its customers and the price the defendant requires its competitors to pay.

Plaintiffs claim that the Federal Power Act does not immunize the defendant's alleged monoply from coverage of the anti-trust laws, and that the defendant itself concedes in its brief on Page 25 that the anti-trust laws may be applied "to the extent that the matter in question is not within the reach of the regulatory agency's supervision." It is argued by the plaintiffs that the Federal Power Act, as interpreted by the Commission, does not itself provide a pervasive regulatory scheme to control the defendant's practice of instituting a dual price system and requiring its competitors to pay more for electric power than its retail customers. Plaintiffs state that the Commission has held that dual price systems and their anti-competitive effects are beyond the Commission's jurisdiction. Thus, the Federal Power Act fails to replace the anti-trust laws with provisions that would regulate the defendant's monopolization or immunize the defendant from the coverage of the anti-trust laws.

After reviewing both parties' arguments as to whether the Court lacks jurisdiction over the subject matter of this action, the Court finds that it does have jurisdiction over the case before it. The defendant has attempted to send the Court down two paths of exclusive jurisdiction and then inform it that because the Court has no control over the

exclusive areas, it has no jurisdiction over the present action. I & M first argues that the retail rates in dispute are the products of approval by the Indiana and Michigan Public Service Commissions and, as such, are protected from the Sherman Act under the reasoning set out in *Parker* v. *Brown, supra.* Next, I & M points out how the Federal Power Act, 16 U.S.C. §824(d)(a) 1970 has granted the Commission the power to decide if the rates and charges made, demanded, or received by a public utility for or in connection with the sale at wholesale of electric energy are just and reasonable and therefore lawful. The Court agrees with the defendant and the principles set forth in *Parker* v. *Brown.* The Court in this case does not have any authority under the Sherman Act to attack the Indiana and Michigan Public Service Commissions' findings that the retail rates implemented by I & M were lawful. The respective state commissions are empowered to determine whether the electric retailers' rates are just and reasonable in relation to cost and rate of return, and the Court in no way intends to intrude upon that particular decision. Further, the Court recognizes that Congress has pre-empted the authority over wholesale rates. There is no dispute but that the Federal Power Commission has been given the task of reviewing the lawfulness of the wholesale rates charged by the defendant company. However, the plaintiffs themselves are not attacking the action of the state commissions, nor the role of the Federal Power Commission. What is really at issue in this case is the action of the defendant, I & M.

I & M deals in both wholesale and retail electric power and, therefore, has to initiate rates which are subject to the scrutiny of the state commissions on one level and the Federal Commission when wholesale rates are put into effect. The Commissions operate independently of one

another and in no way rely on the other's actions when deciding upon the lawfulness of the respective rates. The defendant in this case is also the plaintiffs' only outside source of wholesale electric power, which position makes the Federal Power Commission the only control over the defendant's price for wholesale power since competition with other wholesalers does not exist in the area.

A great portion of the defendant's argument focused on a regulatory agency's exclusive or primary jurisdiction over the rates charged by the defendant. I & M cites the cases of *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), and *Pennsylvania Power Company* v. *F.P.C.,* 193 F.2d 230 (D.C.Cir. 1951), *aff'd.,* 343 U.S. 414 (1952), to support the position that anti-trust laws have no application upon an issue which has been placed under the control of a regulatory agency. Here the defendant contends that Congress has given the power over wholesale rates to the Commission and that anti-trust criteria are not to be the governing factor. In both *Ricci* and *Pennsylvania Power Company* the Court was concerned with conduct covered by the respective regulatory statutes. In *Ricci* the issue before the Court involved whether the defendant had violated the rules of the Chicago Mercantile Exchange, an issue the Supreme Court decided was within the jurisdiction of the Commodities Exchange Commission. In *Pennsylvania Power Company* the Court would not allow anti-trust criteria to be forced upon the Commission in its decision of what rate was just and reasonable.

The case before us is distinct from both *Ricci* and *Pennsylvania Power Company.* Here, the alleged monopolistic practice not only involves rates which are subject to review by the Federal Power Commission but also separate rates

reviewed by state commissions. Further, it is not the decision by the commission, nor the criteria used in the commission's decision, that is under attack by the plaintiffs. Instead, what is sought to be enjoined is beyond the reach of both state and federal commissions and within the power of the defendant; that is, the initiation of a dual rate structure whereby plaintiffs are allegedly being forced out of the retail electric business by the defendant.

The Federal Power Commission itself has indicated that the alleged dual price system and its anti-competitive effects are beyond the Commission's jurisdiction (Order Denying Motion to Reject, Granting Petition to Intervene in Part and Amending Prior Order, Indiana and Michigan Electric Co., FPC Docket No. 7740, November 27, 1973 [Appendix A] Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss or Stay).

The dilemma caused by the seemingly contrary purposes of the regulatory agencies and the anti-trust laws is not a new issue in anti-trust litigation. Although they are different forms of control, they have the same goal and that goal is to serve the public interest. In the Supreme Court case of *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439 (1944), the State of Georgia, as plaintiff, filed suit against twenty railroad companies alleging that the companies conspired to fix their rates in such a manner as to prefer the ports of other states over the ports of Georgia in violation of the anti-trust laws. The Court in *Georgia* stated that "[r]egulated industries are not *per se* exempt from the Sherman Act."

The Court in the Georgia case also cited Justice Brandeis' words in *Keogh* v. *Chicago & N.W. Ry.,* 260 U.S. 156 (1922) wherein he stated as follows:

All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceeding before the Commission . . . . But under the Antitrust Act, a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and if so, the Government may have redress.

The Court further stated:

The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government . . . The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making . . . . The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates.

Although the *Georgia* case involved the Interstate Commerce Commission and not the Federal Power Commission, it has many similarities with the present case. Here, as in *Georgia,* the rates are not within the discretion of the Court. It is also a fact that in the present case, the Federal Power Commission has no power over the alleged anti-trust violation that is asserted here because it involves retail rates over which it has no control. 16 U.S.C. §824.

Because the alleged dual structure is outside the jurisdiction of both the federal and state commissions, there is actually no conflict between the anti-trust laws and the regulatory agency. *Georgia, supra.* The defendant has attempted to present the plaintiffs' claim as one attacking the rates themselves and not one attacking their effect.

The Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1972), faced a similar defense and stated as follows:

The anti-trust charge against Otter Tail does not involve the lawfulness of its retail outlets, but only its methods of preventing the towns served from establishing their own municipal systems when Otter Tail's francise expired.

The Supreme Court in *Ottter Tail* further stated the following with respect to the Federal Power Act, 16 U.S.C. §824:

There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Just as the Court in *Otter Tail* was hesitant to conclude that the authority of the Federal Power Commission to order inter-connections was intended to "be a substitute for, or to immunize Otter Tail from, anti-trust regulation for refusing to deal with municipal corporations", this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structure.

Because regulated industries are not immune from anti-trust laws and because the present case concerns an issue over which the regulatory agency has no jurisdiction, the Court finds that it has jurisdiction over the subject matter of this action, and the defendant's motion to dismiss for lack of jurisdiction is denied.

II—*Failure to State a Claim*

The defendant also argues that the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted because their claim is premature and because if defendant's wholesale rates have been too high, plaintiffs will not be injured because of a possible refund. I & M contends that plaintiffs' claim assumes the existence of two established rates, one for I & M's retail industrial customers and one for the plaintiff municipalities, and that, in fact, there is only one established rate, that being the retail rate. It cites the United States Court of Appeals for the District of Columbia Circuit on rehearing in *Indiana & Michigan Electric Co.* v. *FPC,* Docket No. 72-2168 (D.C. Cir. Aug. 14, 1972), in which the Court altered the effective date of I & M's proposed wholesale rates for electric power and permitted the rates to become effective subject to refund based upon the Commission's decision. It is the defendant's position that although I & M may collect the difference between its old and new rates from December 14, 1972, the rate has not yet been approved by the Commission and thus is subject to being reduced by the Commission.

The facts of this case show that the state commissions have established retail rates and that there is presently pending before the Federal Power Commission the issue of the lawfulness of I & M's wholesale rates. The Court notes that although the question of the rates' lawfulness has not been resolved by the Commission, the rates themselves are in effect and have been for collection purposes since December 14, 1972. It is true that if the Commission finds the rates to be unlawful, the defendant will have to

refund that portion of the rate found to be excessive. On the other hand, if the rates are just in relation to cost and fair rate of return, they will no doubt be upheld by the Commission. In either situation, we are discussing a future result which is in no way based on any of the anti-trust considerations set forth in plaintiffs' complaint.

The Court finds that there are presently in effect two rates: one an established rate for retail electric power, and one a rate for wholesale power, the latter being subject to change by the Commission although it is presently being collected. It would be notably different in this case if the practice of the Commission was to not allow a rate increase to go into effect until after approval by the Commission. For if that were the situation, the plaintiffs would be complaining about a future harm that might never come to pass. Whether the rate presently being charged by the defendant as wholesaler will be upheld by the Commission is not the ultimate concern of the plaintiffs in this case. The real concern here is the defendant's present and future ability to set up a dual price structure by going through two reviewing commissions which have no control over the dual structure.

The fact that the defendant has legally set both its wholesale and retail prices is no ground to immunize it from the anti-trust laws. *Georgia, supra.* The Court finds that although the present wholesale rate is subject to change by the Commission, the Commission has no power over the alleged dual rate structure which is allegedly in effect at this time. Thus, it has no jurisdiction over the issue in this suit. The plaintiffs are not attacking the actual rates charged by the defendant and, therefore, whether the

Commission finds the rate fair is irrelevant to the substantive issue before the Court. The defendant has the right to initiate a given rate, and the Commission has the authority to make sure the rate is fair in relation to cost and rate of return. The initiation of new rate schedules is a continuing process carried on by the defendant. It is also the point over which this Court has the power to provide relief if the plaintiffs can prove their allegation. Because the Court is in reality focusing on the dual price structure and not the actual prices charged for either retail or wholesale, the results of the Commission's decision would only affect whether defendant would have to initiate new rates if the plaintiffs can prove that defendant is violating the Sherman Act, §2. That is, if the Commission finds the defendant's rates to be just, the Court would be forced to order defendant to initiate a new rate structure which eliminated the dual price system of higher wholesale prices. However, if the Commission finds the present rate to be unjust, then the Court would only enjoin the defendant from any future dual system.

The defendant also contends that if the Commission declares the present wholesale rates to be unlawful, the defendant will have to refund the excessive amount and, therefore, there will have been no damage. Whether the plaintiffs are entitled to damages, although not clear at this point, is no reason to deny the Court jurisdiction over this action which seeks injunctive, declaratory and damage relief. If, in fact, the plaintiffs can recover damages in this action, the amount of those damages will have to be proved by the plaintiffs at trial. It is, therefore, the Order of the Court that defendant's motion to dismiss for failure to state a claim be denied.

III—*Stay the Proceeding*

The defendant also asks that if the Court does find that it has jurisdiction over the present action, the action be stayed until a final decision is handed down by the Commission. As stated above, the Commission's decision on the lawfulness of the defendant's wholesale rate is not determinative of the issue before this Court. The issue of the lawfulness of the defendant's rate is in the exclusive jurisdiction of the Commission and is not for this Court to decide. If that were the issue before the Court, the case would have to be dismissed.

Staying the present action will not aid this Court in deciding the matter before it as it did the Court in *Ricci*. In this action the alleged wrong is occurring at this time, and although there is a possibility that agency action may change the situation, the same possibility exists that no change will take place. The agency acts as a review agency after the rate is initiated by the utility company. Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruled on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result.

It is, therefore, the Order of the Court that defendant's motion to stay be denied.

Order of the District Court, October 22, 1976

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Case No. S74-72
Date 10/22/76
Time—From: 1:30
To: 2:30
Deputy R. Timmons
Reporter—Gail
Judge—Allen Sharp

CITY OF MISHAWAKA, INDIANA *et al.*

vs.

INDIANA & MICHIGAN ELECTRIC COMPANY

Plaintiff(s) Represented By Thomas R. Ewald and R. Wyatt Mick Jr.

Defendant(s) Represented By Peter J. Schlesinger and Lawrence Levy

Proceedings:

Hearing had on pending motions. Court hears argument of counsel. Defendant, Indiana & Michigan Electric Company's motion to recosider, vacate, set aside and amend this Court's Order of May 1, 1975, is overruled. On verbal motion of counsel, Defendant is granted leave to file an appeal from this Order, pursuant to Title 28 USC, Section 1292(b). Court reserves its ruling on Pltfs.' motions to dismiss Deft's. counterclaims and to strike parts of Deft's. answer. Deft. is given to November 8, 1976, within which to answer the amendment to the Complaint. SHARP, J.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
municipal corporations,

Plaintiffs,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,
a corporation,

Defendant.

COMPLAINT

Plaintiffs allege as follows:

I.

Jurisdiction and Venue

1. This is an action by ten municipalities that operate their own electric distribution systems against the electric power company that controls their supply of wholesale electric power and also competes against them for retail sales. The plaintiffs request relief against the defendant's monopolization of and attempt to monopolize the distribution and sale of electric power at retail within the area in which it does business, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The plaintiffs seek declaratory and injunctive relief and treble damages.

2. This Court has jurisdiction of this case by virtue of Sections 4 and 16 of the Clayton Act, 5 U.S.C. §§ 15, 26. The defendant company transacts business within the South Bend Division of the Northern District of Indiana.

II.

Parties

3. Plaintiffs, City of Mishawaka, Indiana; City of Niles, Michigan; City of Columbia City, Indiana; City of Bluffton, Indiana; City of Garrett, Indiana; City of Gas City, Indiana; Town of Frankton, Indiana; Town of Warren, Indiana; Town of New Carlisle, Indiana; and Town of Avilla, Indiana, are municipal corporations located within the service area of the defendant Indiana & Michigan Electric

Company. Each of the plaintiffs operates its own electric utility, through which it purchases wholesale electric power from the defendant Indiana & Michigan Electric Company and sells and distributes the electric power at retail to industrial, commercial, and residential customers within its corporate limits and in nearby areas.

4. Defendant Indiana & Michigan Electric Company (sometimes referred to herein as "I&M" or "the company") is incorporated under the laws of the State of Indiana and is doing business in the plaintiff municipalities and elsewhere in the States of Indiana and Michigan. The defendant I&M is a vertically integrated electric power company, which generates electric power, transmits the power throughout its service area, and delivers the power both to its wholesale customers, including the plaintiffs, and directly to its own retail customers.

III.

Nature of Trade and Commerce

5. The defendant company is the only firm within its service area engaged in the business of transmitting and selling electric power at wholesale. The defendant company is the plaintiffs' only outside source of supply for wholesale electric power. Plaintiffs Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; New Carlisle, Indiana; and Avilla, Indiana, depend on the defendant for all of their requirements of wholesale electric power for distribution and sale to their retail customers. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generating facilities, nevertheless depend on the defendant for

more than 90% of their requirements of electric power for distribution and sale to their retail customers.

6. The defendant I&M also dominates and controls the distribution and sale of retail electric power within its service area. The defendant company has increased its control of the retail market by acquiring municipal electric utilities. Since 1957, the defendant has purchased the assets of four of the 20 municipal utilities within its service area, has absorbed their retail distribution facilities into the I&M system, and has taken over their retail industrial, commercial, and residential customers, as follows: Kendallville, Indiana (1957), Decatur, Indiana (1959), Portland, Indiana (1963), and Albion, Indiana (1966). In 1964, the defendant attempted to acquire the municipal electric utility of the City of South Haven, Michigan, but the sale was rejected by the voters of the City in three successive elections. The defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%.

IV.

Violations of Law

7. The defendant I&M has monopolized and has attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, as follows:

(a) Since January 13, 1973, the defendant I&M has required municipalities, including the plaintiffs, to pay a

new wholesale price for electric power. In contrast to its previous practice, the defendant company's new wholesale price to municipalities is substantially higher than the retail price the defendant company charges its own industrial customers. As a result, the municipalities have become financially unable to buy power at the defendant's new wholesale price and sell it to their own industrial customers at prices that are competitive with the defendant's present retail prices;

(b) On March 8, 1974, after fourteen months of requiring the City of Fort Wayne, Indiana, to pay more for wholesale electric power than the defendant I&M's own retail industrial customers pay and after more than twenty years of selling retail electric power to its own customers in the Fort Wayne area for less than it sells retail power elsewhere, the defendant I&M obtained the agreement of City officials that the City of Fort Wayne will lease its entire electric utility system to the defendant I&M for thirty-five years. Under the lease agreement to be submitted to the voters the defendant I&M will take possession of all of the property and facilities of the City's electric utility and will operate the electric distribution system. The defendant company will take over the City's retail customers and will sell electric power to them directly. Fort Wayne is the largest City within the defendant company's service area which still operates its own electric utility.

8. The defendant company's adoption of a wholesale price to municipalities in excess of the retail prices at which it sells electric power to its own industrial customers has caused and threatens to cause the following consequences:

(a) The defendant company has impaired the plaintiffs' ability to compete against the defendant for retail industrial customers;

(b) In those municipalities that have absorbed the difference between the defendant's higher wholesale price and the defendant's lower retail industrial prices, the electric utility's loss of earnings exerts pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant;

(c) In those municipalities that increase their own industrial retail prices to the level of the defendant's higher wholesale price, which they must pay for electric power, and above the level of the defendant's lower retail industrial prices, the disparity between the municipalities' higher retail industrial prices and the defendant I&M's lower retail industrial prices threatens to cause the municipalities' industrial customers to exert pressure on the municipality to sell or lease its utility to the defendant I&M so they can purchase electric power at the defendant's lower prices.

9. The acts and practices of the defendant I&M alleged herein have been done with the intent, and have had the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail and have injured the plaintiff municipalities in their business and property in an amount exceeding $1,000,000 before trebling. The plaintiffs' losses are continuing.

10. Unless the relief requested by this Complaint is granted, the defendant company will continue to violate 15 U.S.C. §2.

V.

Relief

WHEREFORE, plaintiffs pray as follows:

1. For a declaratory judgment that the defendant company has violated 15 U.S.C. §2 by monopolizing and attempting to monopolize the distribution and sale of electric power at retail within its service area.

2. For an order enjoining the defendant company, its officers, agents, employees, successors, and all persons in active concert or participation with them, from violating 15 U.S.C. §2.

3. For an order enjoining the defendant I&M from maintaining a disparity between the prices at which it sells electric power and under which it requires the plaintiff municipalities to pay a higher wholesale price than the retail prices at which it sells and distributes power to its own industrial customers.

4. For an order awarding the plaintiffs treble the amount of damages they have sustained as a result of the defendant's violations of 15 U.S.C. §2.

5. For an order awarding the plaintiffs reasonable attorney's fees, together with the costs and disbursements of this action.

6. For such other and additional relief as the interests of justice may require.

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Amendment to the Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA, *et al.*,

Plaintiffs,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,

Defendant.

AMENDMENT TO THE COMPLAINT

The plantiffs allege as follows:

7. (c) Since July 27, 1976, the defendant I & M has required municipalities, including the plaintiffs, to pay a new, higher wholesale price for electric power. As a result, the municipalities have become financially unable to buy power at the defendant's new wholesale price and sell it to indus-

trial customers at prices competitive with the defendant's present retail prices.

s/

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